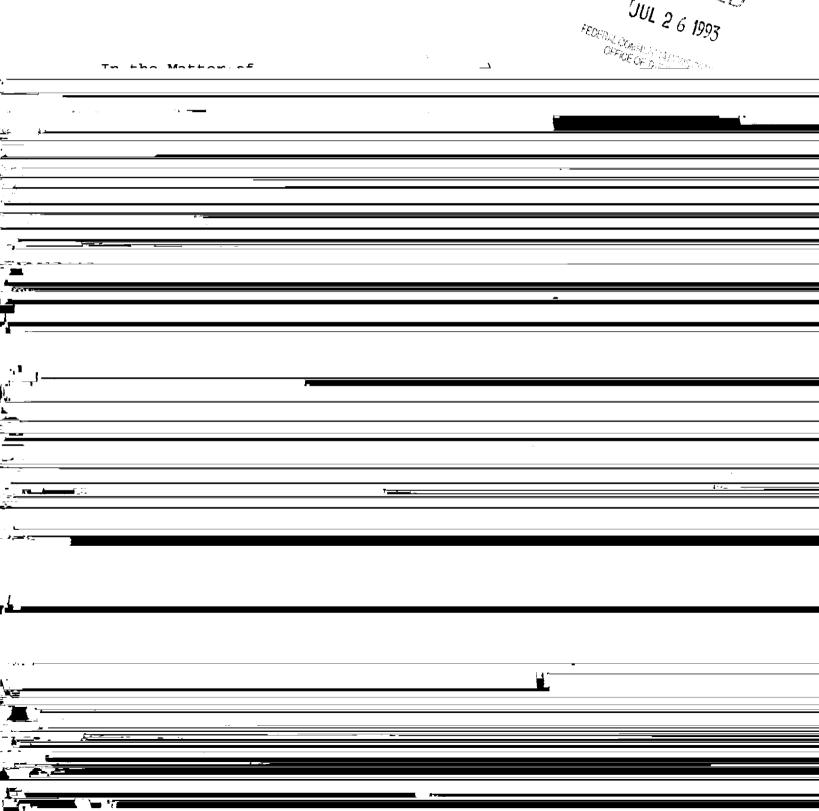
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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.





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Federal Communications Commissi

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OA)	COMMUNICATIONS COMMISSION
	St. MET (4) 53/01

In the Matter of

Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992) }	
riotection and competition Act or 1992	í	MM Docket No. 92-265
Development of Competition and)	
Diversity in Video Programming)	
Distribution and Carriage)	

REPLY OF LANDMARK COMMUNICATIONS, INC. TO OPPOSITIONS

Landmark Communications, Inc. ("Landmark") hereby submits its Reply to Oppositions in the above-captioned proceeding.1

	I.	INTRODUCTION
		Landmark urges the Commission to:
		Adopt the Wiscom prepared to exempt from the pressure
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• Amend its definition of "competing distributor" to require substantial overlap of actual or proposed service areas.

II. THE COMMISSION SHOULD EXEMPT FROM THE PROGRAM ACCESS RULES ANY PROGRAM SERVICE WHOSE COMMONLY OWNED CABLE SYSTEMS ACCOUNT FOR LESS THAN FIVE PERCENT OF THE SUBSCRIBERS TO THAT PROGRAM SERVICE

THAT PROGRAM SERVICE

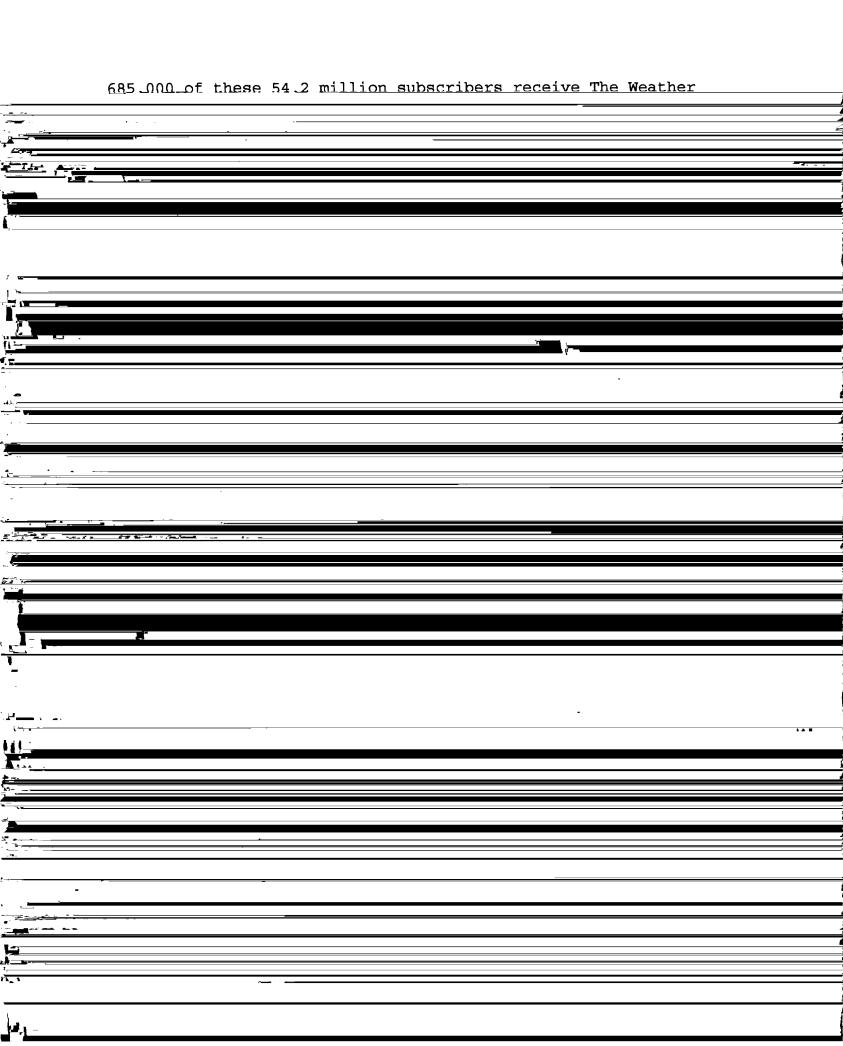
profitably in anticompetitive behavior in dealing with alternative distributors. 6

In fact, the Crandall Study finds that "cable ownership far in excess of that contemplated by Viacom's proposal is needed to make discrimination profitable...." Moreover, the Study notes that failure to establish a <u>de minimis</u> exemption will create disincentives for relatively small companies to produce cable programming, contrary to the Act and antitrust policy. 8

Landmark supports the findings of the Crandall Study and urges the Commission to adopt the Study's recommended <u>de minimis</u> exemption. The program access rules were designed to reach program services with sufficient size and scope to significantly harm competition. Program services lacking such size and scope, by definition, cannot have that impact on the marketplace.

In its Comments, Landmark pointed out that it could not survive as a programmer by serving only, or even principally, its attributed TeleCable cable systems. Rather, Landmark must look to unaffiliated distributors for the overwhelming majority of subscriptions to The Weather Channel and the Travel Channel. For example, The Weather Channel serves over 53 million cable subscribers and over 1.2 million HSD, MMDS, and SMATV subscribers for a total subscribership of 54.2 million. However, only

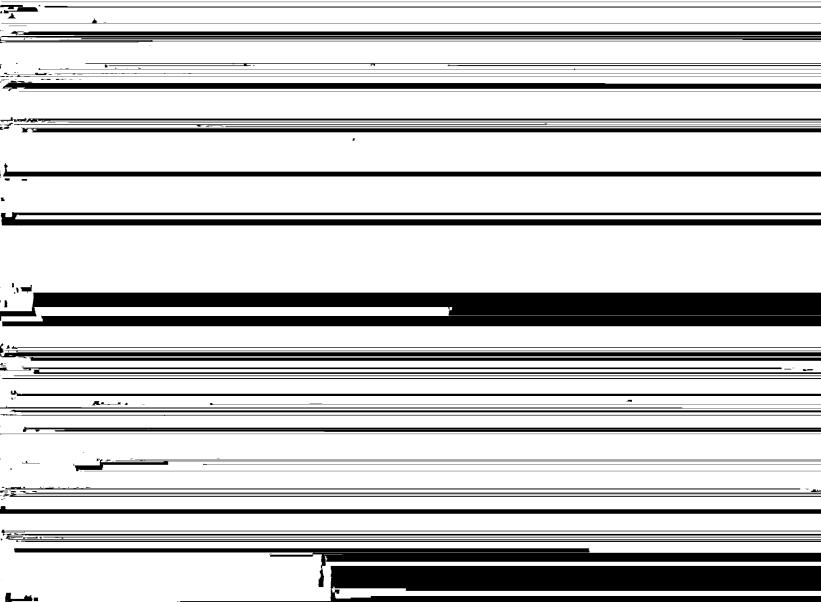
⁶ Crandall Study at 1. See also id. at 7.



Commission should look to the "substantial data" and well-supported findings of the Crandall Study and exempt from the rules any program service whose commonly owned cable systems provide less than five percent of the service's total subscribers.

III. A DAMAGES REMEDY FOR PROGRAM ACCESS VIOLATIONS CANNOT BE SUPPORTED ON EITHER STATUTORY OR POLICY GROUNDS

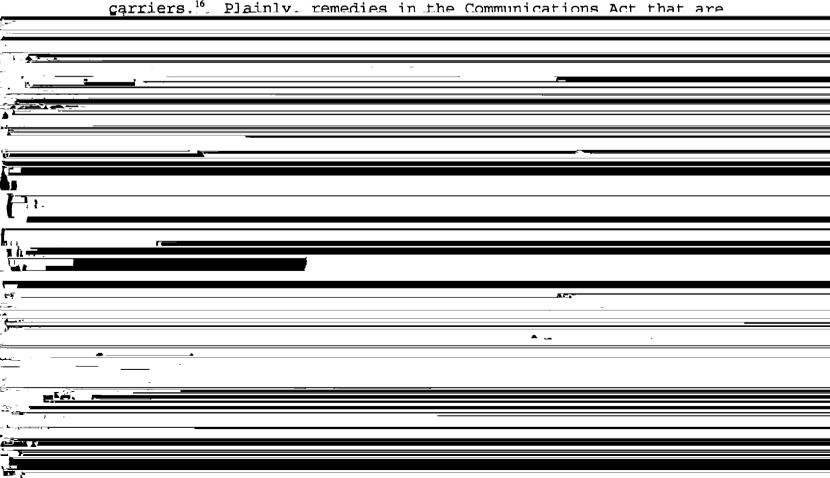
Landmark joins commenters opposing NRTC's request that the Commission reserve the right to award damages in program access cases. In the Order, the Commission correctly concluded that the 1992 Cable Act does not grant "authority to assess damages



are not included in Section 628(e), the Commission was correct in excluding damages as an available remedy.

A damages remedy also would be inconsistent with clear Supreme Court precedent that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." The Commission correctly found in the Notice in this proceeding that the Act and its legislative history are silent concerning application of the program access rules to existing contracts. Thus, because the Act does not even intimate, let alone "require" retroactive application, the Commission may not apply the rules retroactively to impose damages on programmers.

NRTC bases its position entirely on provisions of the Communications Act which provide damages in certain circumstances for common carriers. However, the Act also clearly states that cable operators are not subject to regulation as common carriers. Plainly, remedies in the Communications Act that are



impunity 17 ignores the substantial remedies already contained in Section 628(e). Not only may the Commission "establish prices.

to compete in the marketplace. 21 Landmark supports this solution On an eminently readenable demonstrate. Met entruit and a 1111 122 132

nor the ability to engage in anticompetitive conduct in particular markets in which it is not vertically integrated:

We agree with the majority of commenters who argue that cable operators have no incentive to favor programming services that are affiliated with a rival MSO. Moreover, there is no opportunity for a vertically integrated cable operator to control the content or distribution of a programming service in which it has no ownership interest. We also agree with commenters who note that application of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are affiliated with the particular cable operator, would severely inhibit MSO investment in programming services, since the mere fact of such MSO investment would restrict carriage of the programming service on all cable systems. 25

Because discrimination resulting from vertical integration is the only practice with which Congress was concerned (as demonstrated by the fact that Congress chose not to apply the program access rules to non-vertically integrated programmers), the Commission should heed its own findings in its ownership proceeding and limit application of the program access rules to areas in which anticompetitive practices could occur.

VI. THE COMMISSION SHOULD ADOPT A MORE STRINGENT DEFINITION OF "COMPETING DISTRIBUTOR"

Under the rules, a distributor may bring a program access complaint if there is "some overlap in actual or proposed service area" with a competing distributor. 26 Landmark believes such a definition of "competing distributor" is vague and unjustifiably lenient. The area covered by competing distributors rarely will overlap precisely. Thus, because the Commission has given no

 $^{^{25}}$ <u>Id.</u> at ¶ 181 (first and second emphases added; third emphasis in original).

Order at ¶ 96.

guidance on how much overlap is necessary to satisfy the requirement of "some" overlap, there will be confusion in many cases. Moreover, the current definition of "competing



CERTIFICATE OF SERVICE

I, Francis M. Buono, do hereby certify that I have this 26th day of July, 1993, caused a copy of the foregoing "Reply of Landmark Communications, Inc. To Oppositions" to be served by first-class mail on the following:

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